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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~923.~~ 97

JOHN MÜLLER AND JOHN ZIMMER, PLAINTIFFS IN ERROR,

vs.

LOUIS EHLERS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

FILED NOVEMBER 6, 1873.

SUPREME COURT OF THE UNITED STATES.

No. 323.

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1 Circuit court of the United States of America for the eastern district of Wisconsin.

UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

At a stated term of the circuit court of the United States for the eastern district of Wisconsin, begun and held, according to law, at the city of Oshkosh, in said district, on the first Monday (being the seventh day) of July, A. D. 1873. Present, the honorable Thomas Drummond, circuit judge, presiding, and the honorable Andrew G. Miller, district judge. Also present, Edward Kurtz, clerk of said court; Charles T. Hamilton, marshal; and Levi Hubbell, attorney for said district.

Among other the following proceedings were had, to wit:

LOUIS EHLERS, PLAINTIFF,
vs.
JOHN MÜLLER & JOHN ZIMMER, DEFENDANTS. } At law.

Be it remembered that heretofore, to wit, on the 15th day of March, A. D. 1871, came the above-named plaintiff by his attorneys, Messrs. Mann & Cotzhausen, and filed his declaration in ejectment with
2 a notice for an appearance on the first Monday of April ensuing, and the marshal's return of service thereof on the defendants on the 13th day of March, 1871, which declaration, &c., are as follows, to wit:

3 Circuit court of the United States for the eastern district of Wisconsin. Of the first Monday of April, A. D. 1871.

EASTERN DISTRICT OF WISCONSIN, *ss:*

Louis Ehlers, who is a citizen of the State of Iowa, by Mann & Cotzhausen, his attorneys, complains of John Müller and John Zimmer, defendants, in this suit, who are citizens of the State of Wisconsin.

For that whereas the said plaintiff heretofore, to wit, on the first day of March, in the year of our Lord one thousand eight hundred and seventy-one, was possessed of the following-described piece or parcel of land, situate, lying, and being in the county of Ozaukee and State of Wisconsin, to wit: The west half of the northeast quarter of section thirty-three (33,) town' twelve (12) north, range twenty-one (21) east, containing eighty acres of land, more or less, according to Government survey, of great value, to wit, of the value of five thousand dollars; which said premises the said plaintiff claims in fee, and the said plaintiff being so possessed thereof, the said defendants afterwards, to wit, on the sixth day of March, in the year of our Lord one thousand eight hundred and seventy-one, entered into the said premises and ejected the said plaintiff therefrom, and now unjustly and unlawfully with'olds from the said plaintiff the possession thereof, to the damage of the plaintiff of one thousand dollars, and therefore he brings suit, &c.

MANN & COTZHAUSEN, *Plff.'s Attys.*

TO JOHN MÜLLER & JOHN ZIMMER:

You are hereby notified that the declaration, with a copy whereof you are now herewith served, and to which copy this notice is subjoined, will be filed in the office of the clerk of said court in the city of Mil-

waukee, on the first Monday of April, 1871; that upon filing the same a rule will be entered requiring you to appear and plead to the said declaration by the first Monday of May, after the entry of such rule, and that if you neglect so to appear a judgment by default will be entered against you, and the plaintiff will recover possession of the premises specified in the said declaration.

Dated this 8th day of March, 1871.

Yours, &c.,

MANN & COTZHAUSEN, *Plff.'s Attys.*

4 Served on the within-named John Zimmer by showing him this declaration, &c., and delivering him a copy thereof on the 13th day of March, 1871, and served on the within-named John Müller by showing him this declaration, &c., and delivering him a copy thereof this 14th day of March, 1871.

Fees, $8.56.

C. S. HAMILTON, *Marshal,*
By N. S. TURNER, *Deputy.*

5 *Rule to plead.*

APRIL 3, 1871.—"On motion of Mann & Cotzhausen, plaintiff's attorneys, ordered that the defendants plead to the plaintiff's declaration on file, by the first Monday of May next, or their default will be entered."

Plea.

APRIL 28, 1871.—This day came the defendants by their attorney, Mr. Foster, and filed their plea as follows:

United States circuit court for the eastern dist. of Wisconsin.

JOHN MÜLLER & JOHN ZIMMER
ads.
LOUIS EHLERS.

And the said John Müller and John Zimmer, defendants, by Geo. W. Foster, their attorney, come and say that they are not guilty of unlawfully withholding the premises claimed by the said Louis Ehlers, as alleged in the said declaration of the said Louis Ehlers, and of this they, the said John Müller and the said John Zimmer, put themselves on the country, and the said John Ehlers doth the like.

GEO. W. FOSTER,
Defts.' Atty.

And afterwards, to wit, at a stated term of said court, begun and held, according to law, at the city of Milwaukee, on the first
6 Monday (being the first day) of January, A. D. 1872, and on the 16th day of said term, to wit, on the 18th day of January, A. D. 1872—present the Hon. Andrew G. Miller, district judge, presiding—the following proceedings were had, to wit:

Trial.

LOUIS EHLERS
vs.
JOHN MÜLLER & JOHN ZIMMER. } At law.

This day came the parties, by their counsel, and the issue herein

came on to be tried, when the parties entered into a written stipulation as herein filed, to wit: "It is hereby stipulated and agreed by and between the parties to this suit, to waive a jury in the above cause, and to try the same before the court without a jury. Dated January 9th, 1872. (Signed) Mann & Cotzhausen, plffs.' attys., G. W. Foster, defts.' atty. And the said issue was thereupon tried by the court, and being submitted by the said counsel, the court took the same under advisement.

And afterwards, to wit, on the twenty-fifth day of said term, to wit, on the 24th day of February, A. D. 1872—present, the Hon. Andrew G. Miller, district judge, presiding—the following proceedings were had, to wit:

Finding & judgment.

LOUIS EHLERS
vs.
JOHN MÜLLER & JOHN ZIMMER. } At law.

7 This day came the parties, by their counsel, and on consideration of the pleadings and the evidence and the arguments of counsel, the court doth find that the defendants are not guilty of unlawfully withholding from the plaintiff the premises described in the declaration, and that the plaintiff is not entitled to recover possession of the same. Whereupon it is considered and adjudged by this court now here that the plaintiff take nothing by his suit, and that the defendants do have and recover of the said plaintiff, Louis Ehlers, twenty-four dollars and seventy-one cents, their costs about their said defense in this behalf by them expended, and that they have execution therefor.

Judgment-roll signed February 24th, A. D. 1872. Costs $24.71.
EDWARD KURTZ, *Clerk.*

Judgment-roll filed February 24th, A. D. 1872, at five o'clock p. m.
EDWARD KURTZ, *Clerk.*

And same day came the plaintiff, by his counsel, and moved the court for a new trial under the statute. Whereupon it is ordered by the court that a new trial be, and hereby is, granted upon payment
8 of the costs of the former trial, the plaintiff to file an undertaking in the sum of two hundred and fifty dollars, to pay all costs and damages, including the mesne profits, that may be awarded against him on the final determination of the suit, according to law.

MARCH 4, 1872.—This day came the plaintiff, by his attorneys, and paid the costs of the former trial, and filed the undertaking of Henry Kirchoff and Patrick Dockery. Whereupon it is ordered that the judgment herein be vacated and a new trial ordered.

MAY 7, 1872.—This day came the plaintiff, by his counsel, and on his motion, it is ordered by the court that this cause be and hereby is continued.

And afterwards, to wit, at a stated term of said court begun and held according to law, at the city of Milwaukee, on the first Monday (being the seventh day) of October, A. D. 1872, and on the third day of said term, to wit, on the 9th day of October, A. D. 1872, present the Hon.

Thomas Drummond, circuit-judge, presiding, the following proceedings were had, to wit:

9 *Second trial.*

LOUIS EHLERS
vs.
JOHN MÜLLER & JOHN ZIMMER. } At law.

This day came the parties, by their counsel, Mr. Cotzhauson appearing for the plaintiff, and Messrs. George W. Foster and M. H. Carpenter for the defendants; and the issue herein came on to be tried by consent by the court, a jury being waived, pursuant to an agreement in writing of the parties heretofore filed, and the trial not being concluded, the same was adjourned until to-morrow morning.

OCTOBER 10, 1872.—This day came the parties, by their counsel, and the trial of the issue herein was resumed by the court, and not being concluded, the same was adjourned until to-morrow morning.

OCTOBER 11, 1872.—This day came the parties, by their counsel, and the trial of the issue herein was resumed by the court, and not being concluded, the same was adjourned until to-morrow morning.

OCTOBER 12, 1872.—This day came the parties, by their counsel, and the trial of the issue herein was resumed, and being concluded, the court held the same under advisement.

10 And afterwards, to wit, at a special term of said court begun and held at the city of Milwaukee, on the second Monday (being the fourteenth day) of April, A. D. 1873, and on the thirteenth day of said term, to wit, on the 28th day of April, A. D. 1873, present the Hon. Thomas Drummond, circuit judge, presiding, the following proceedings were had, to wit:

Finding of the court.

LOUIS EHLERS
vs.
JOHN MÜLLER & JOHN ZIMMER. } At law.

This day came the parties by their counsel, and on consideration of the pleadings and evidence and the arguments of counsel thereon, the court doth find that the defendants are guilty of unlawfully withholding from the plaintiff the possession of the premises described in the declaration, to wit, the following-described piece or parcel of land, situate, lying, and being in the county of Ozaukee and State of Wisconsin, to wit, the west half of the northeast quarter of section thirty-three, (33,) town. twelve (12) north, range twenty-one (21) east, containing eighty acres of land, more or less, according to Government survey, and that the plaintiff has established a title in fee therein, and is entitled to
11 recover possession of the same; and came the defendants by their counsel, and moved the court for a new trial for reasons filed, as follows, to wit:

Motion for new trial.

Circuit court U. S. eastern district Wisconsin.

LOUIS EHLERS
vs.
JOHN MÜLLER ET AL.

And now come the defendants in the above-entitled action, by George W. Foster, attorney, and in person, and move the court now here for an order granting a new trial therein, upon the minutes of the court, upon the following grounds:

1st. Because the findings of fact of the judge are not warranted by the evidence in said action.

2nd. Because the conclusions of law of the judge therein are erroneous, and not warranted by the statutes of Wisconsin or by the law of the land.

3rd. Because the aforesaid findings of fact are against law and evi dence.

4th. Because the issues of fact in said action are proper to be tried by a jury, and the defendants ought to have the verdict of a jury thereon.

Dated April 28th, 1873.

GEORGE W. FOSTER,
Defts.' Atty. & in Person.

12 And now at this same term, to wit, July term, A. D. 1873, and on the third day thereof, to wit, on the 9th day of July, A. D. 1873, the following proceedings were had, to wit:

Hearing of motion for new trial.

LOUIS EHLERS
vs.
JOHN MÜLLER & JOHN ZIMMER. } At law.

This day the motion of the defendants for a new trial came on to be heard, and was argued by Mr. Hubbell for the defendants, and by Mr. Cotzhausen for the plaintiff, when the court took the same under advisement.

And afterwards, to wit, on the eighth day of said term, to wit, on the 15th day of July, A. D. 1873—present, the Hon. Thomas Drummond, circuit judge, presiding—the following proceedings were had, to wit:

Judgment.

LOUIS ELHERS
vs.
JOHN MÜLLER & JOHN ZIMMER. } At law.

13 This day, on consideration of the motion of the defendants for a new trial, it is ordered by the court that said motion be and hereby is overruled. Whereupon it is considered and adjudged by this court now here, that the plaintiff do have and recover of the defendants, John Müller and John Zimmer, possession of the following described piece or parcel of land, situate, lying, and being in the county

of Ozaukee and State of Wisconsin, to wit, the west half of the north-east quarter of section thirty-three, (33,) town. twelve (12) north, range twenty-one (21) east, containing eighty acres of land, more or less, according to Government survey, being the premises described in the declaration, together with one hundred and thirty-four dollars and six cents, his costs about his said suit in this behalf by him expended, and that he have a writ of possession and execution therefor.

Judgment-roll signed July 15th, A. D. 1873.

Costs, $134.06.

EDWARD KURTZ, *Clerk.*

Judgment-roll filed July 15th, A. D. 1873, at five o'clock p. m.

EDWARD KURTZ, *Clerk.*

JULY 25, 1873.—This day came George W. Foster, Orman Coe, and John B. Ingersoll, of the town of Port Washington, Ozaukee County,
Wisconsin, and filed their bond in the sum of one thousand dol-
14 lars, conditioned that the defendants shall prosecute a writ of error to effect, and answer all damages and costs if they fail to make their plea good, which bond is approved by the district judge as a bond for supersedeas, and is as follows:

Bond on writ of error.

Know all men by these presents, that we, George W. Foster, Orman Coe, & John B. Ingersoll, of the town of Port Washington, in Ozaukee County, in the State, of Wisconsin, are held and firmly bound unto Louis Ehlers, of the same county and State, in the full and just sum of one thousand dollars, lawful money, to be paid to the said Louis Ehlers, his certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents, sealed with our seals, and dated this twenty-fourth day of July, in the year of our Lord one thousand eight hundred and seventy-three.

Whereas, lately at a term of the circuit court of the United States for the eastern district of Wisconsin, in a suit depending in said court between the said Louis Ehlers as plaintiff, and John Müller and John Zimmer as defendants, a judgment for the recovery of the premises described in the plaintiff's complaint was rendered against the said de-
fendants, and the said defendants having obtained a writ of error
15 and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said plaintiff, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington, the second Monday of October next:

Now, the condition of the above obligation is such, that if the said John Müller and John Zimmer shall prosecute their said writ to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

GEORGE W. FOSTER. [L. S.]
ORMAN COE. [L. S.]
J. B. INGERSOLL. [L. S.]

Sealed and delivered in presence of—
H. L. COE.

(Endorsed:) July 25, 1873. Approved as a bond for supersedeas. A. G. Miller, district judge.

Whereupon it is ordered that execution be superseded, and a writ of error and citation issued, and a copy of said writ of error lodged for defendant in error.

OCTOBER 27, 1872.—Bill of exceptions signed and filed by order of court, as of the 28th of April, A. D. 1873, as follows, to wit:

16 *Bill of exceptions.*

Circuit court of the United States for the eastern district of Wisconsin.

LOUIS EHLERS
vs.
JOHN MULLER ET AL.

Be it remembered that this cause was submitted to the court by stipulation in writing without the intervention of a jury.

The plaintiff proved that on the 17th of October, 1856, Orin Case and Austin Case were the owners of the land in controversy when they with their wives made a valid mortgage of the land to the Milwaukee & Superior Railroad Company, (by the mortgage the mortgagors covenanted to pay all taxes from year to year,) which mortgage was foreclosed in the circuit court of Ozaukee County, the county where the land was situate.

It was admitted that the defendants were in possession of the land at the commencement of the suit, and that its value was more than three thousand dollars.

To prove the foreclosure of the mortgage, the plaintiff offered the following judgment-roll, accompanied by the minutes of the clerk, to wit:

17 STATE OF WISCONSIN, OZAUKEE COUNTY,
Circuit Court Clerk's Office, ss:

I, Hugo Boclo, clerk of said court, hereby certify that I have compared the papers hereto attached with an original judgment-roll in my office, and find the same to be a correct transcript therefrom.

In witness whereof I have hereunto set my official seal and subscribed my name this 5th day of October, 1872.

[SEAL.] HUGO BOCLO, *Clerk*,
By C. E. CHAMBERLIN, *Deputy*.

Summons for relief.

Circuit court Ozaukee County.

HENRY KIREHHOFF
against
DENCY CASE, AUSTIN CASE, MARY L. CASE, Alanson Case, Seymour Case, George W. Foster, George A. Rowe, Joseph Mann, E. S. Turner, & John Müller. (Com. not served.)

To the above-named defendants:

You are hereby summoned and required to answer the complaint in this action, which will be filed in the office of the clerk of the circuit court, county of Ozaukee, at Port Washington, in said county, and to serve a copy of your answer to the said complaint on the sub-
18 scribers at their office, over Second Ward Saving Bank in the

city of Milwaukee, Wisconsin, within twenty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiff in this action will apply to the court for the relief demanded in the complaint.

Dated December 18th, 1869.

MANN & COTZHAUSEN,
Plaintiff's Attorneys.

OZAUKEE COUNTY, *ss:*

I hereby certify that on the 22d day of December, 1869, at Port Washington, in said county, I served the within summons and the notice of object of action thereto attached on each of the within-named defendants, George W. Foster & E. S. Turner, by delivering to and leaving with each of them personally copies thereof. I further certify that on the 23d day of December, 1869, at the town of Fredonia, in said county, I served the within summons & the notice of object of action thereto annexed on the within-named defendants, John Müller, by delivering to and leaving with him personally copies thereof.

I further certify that I endorsed on each of said copies of said summons and notice of object of action so as aforesaid served on said several defendants above named over my signature that the same are true and correct copies of the original summons & notice of object of action and the date of the service of the same, and certify that, after diligent
19 seach and inquiry, Dency Case, Austin Case, Mary L. Case, Alanson Case, Seymour Case, George A. Rowe, & Joseph Mann, defendants within named, could not be found within my bailiwick.

Fees: $6.50.

MICHAEL DRES, *Sheriff.*
MICHAEL RUPPERT,
Under Sheriff.

Circuit court, county of Ozaukee.

HENRY KIREHHOFF
a.
DENEY CASE, AUSTIN CASE, MARY L. CASE, Alanson Case, Seymour Case, George W. Foster, George A. Rowe, Joseph Mann, E. S. Turner, & John Müller.

To the above-named defendants:

The object of the above action, in which a summons is herewith served upon you, is to foreclose a mortgage executed by the above-named defendants, Deney Case, Austin Case, Mary L. Case, and one Orin Case, now deceased, to the Milwaukee & Superior Railroad Company, on the seventeenth day of October, one thousand eight hundred and fifty-six, for the sum of fifteen hundred dollars, with interest at eight p'r cent. p'r annum from July 1st, 1857, which mortgage is recorded in the office of the register of deeds of the county of Ozaukee, in volume No. 5 of mortgages, on page 42, and no personal claim is made against any of said defendants except the defendant Austin Case, & the fol-
20 lowing is a description of the said mortgaged premises: The west half of the northeast quarter of section thirty-three, town. twelve

(12) north, range twenty-one (21) east, in the county of Ozaukee, State of Wisconsin.

MANN & COTZHAUSEN,
Plaintiff's Attorneys.

Dated Dec. 18, 1869.

MILWAUKEE COUNTY:

I certify that on the 11th day of January, 1870, at the city & county of Milwaukee, I served within notice of object of action & the summons thereto annexed on Joseph Mann, one of the defendants therein named, by leaving copies thereof at his usual place of abode in said city, in the presence of his wife, who is a member of his family, of suitable age and discretion, to whom I explained the contents thereof, (the said defendant Joseph Mann not being personally found,) and I further certify that I endorsed on said copies so served over my signature the date of such service, & that the same were true copies of the original summons & notice.

GUSTAV BRUNST, *Sheriff*,
By W. G. PARSONS, *Under Sheriff*.

Fees $1.95.

State of Wisconsin, circuit court, county of Ozaukee.

HENRY KIRCHHOFF
against
DENEY CASE, AUSTIN CASE, MARY L. CASE, Alanson Case, Seymour Case, George W. Foster, George A. Rowe, Joseph Mann, E. S. Turner, & John Muller.

21 The complaint of the above-named plaintiff respectfully shows to the court upon information and belief that the defendant Austin Case, together with one Orin Case, now deceased, for the purposes of securing the payment to the Milwaukee & Superior Railroad Company, a corporation created by and under the laws of the State of Wisconsin, and organized pursuant to an act of the legislature of the State of Wisconsin, entitled "An act to incorporate the Milwaukee & Superior Railroad Company," approved March 4th, 1856, and the acts amending the same, of the sum of fifteen hundred dollars, on or about the seventeenth day of Oct., 1856, made, executed, and delivered to the said Milwaukee & Superior Railroad Company a promissory note in writing, of which the following is a copy:

"Know all men by these presents that Orin Case and Austin Case, of Fredonia, county of Ozaukee and State of Wisconsin, being justly indebted to the Milwaukee & Superior Railroad Company in the sum of fifteen hundred dollars lawful money of the United States of America for full value received, do*es*, in consideration thereof, hereby promise to pay the said Milwaukee & Superior Railroad Company or order the said sum of fifteen hundred dollars, at the expiration of ten years from the first day of July, in the year of our Lord one thousand eight hundred and fifty-six, together with interest thereon at the rate
22 of eight per centum per annum, payable annually on the first day of July in each year after the date hereof, principal and interest payable at the office of said company, in the city of Milwaukee.

"In witness whereof we have hereunto set our hands this seventeenth day of October, in the year one thousand eight hundred and fifty-six.

(Signed) "ORIN CASE.
"AUSTIN CASE."

That as collateral security for the payment of the said note the said defendants, Deney Case, Austin Case, Mary L. Case, the aforesaid Orin Case, now deceased, on the same day executed, duly acknowledged, and delivered to the said Milwaukee & Superior Railroad Company a mortgage, whereby they granted, bargained, and sold to the Milwaukee & Superior Railroad Company the following-described premises, lying and being in the State of Wisconsin, in the county of Ozaukee, with the appurtenances, viz: The west half of the northeast quarter of section thirty-three (33), town. twelve (12) north, range twenty-one (21) east, in the county of Ozaukee & State of Wisconsin.

By which mortgage it was expressly conditioned that if the said Orin Case, now deceased, and the said defendants Deney Case, Austin Case, and Mary L. Case, their heirs, executors, administrators, or as-
23 signs, should well and truly pay or cause to be paid to the said Milwaukee & Superior Railroad Company or their assigns the sum fifteen hundred dollars in ten years from the 1st day of July, A. D. 1856, and interest thereon from and after the 12th day of July, A. D. 1856, at the rate of eight per centum per annum, according to the tenor and effect of the aforesaid note; and should pay all taxes and assessments upon said premises, and every part thereof, at the time when the same should become due; then said mortgage and said note should be null and void. And in case of the non-payment of the said sum and interest mentioned in said note or any part thereof at the time or times above limited for the payment thereof, or in case of the non-payment of any taxes that might be assessed on said premises in manner aforesaid, then, and in either case, it should be lawful for the said Milwaukee & Superior Railroad Company or their assigns, and they and their assigns were thereby empowered and authorized, to grant, bargain, sell, release, and convey the said premises with the appurtenances thereto belonging at public auction or vendue, and on such sale to make and execute to the purchaser or purchasers, or his or their heirs and assigns forever, good, ample, and sufficient deeds of conveyance in the law, pursuant to the statute in such cases made and provided; and out of the
24 moneys arising from such sale, to retain the principal and interest which should then be due on the said note, together with the costs and charges, and all taxes, assessments, and charges on said premises which might be paid by the said Milwaukee & Superior Railroad Company, or their assigns, rendering the surplus money, if any, to the said mortgagors, their heirs, executors, administrators, or assigns, after deducting the costs of such vendue as aforesaid.

And the said plaintiff further shows that the said mortgage was duly acknowledged so as to entitle it to be recorded, and was afterwards recorded in the office of the register of deeds of Ozaukee County, on the twenty-first day of October, 1856, at 10 o'clock in the forenoon, in volume No. five of mortgages, on page 42.

The plaintiff further shows and alleges that afterwards the Milwaukee and Superior Railroad Company made and executed its writing obligatory, sealed with its seal, subscribed by its president, and countersigned by its secretary, bearing date the twenty-seventh day of October, 1856, whereby it bound itself to pay to H. A. Fullert & Co. or bearer the sum of fifteen hundred dollars on the first day of July, 1866, at the Ameri-

can Exchange Bank, in the city of New York, together with interest thereon at the rate of eight per cent. per annum, payable on each
25 first days of January and July semi-annually thereafter, on the presentation and surrender of the said coupons annexed to said bond, at said bank, and in and by said bond assigned and transferred to the holder of said bond the note and mortgage aforementioned, which were annexed thereto, to secure the payment of said bond, with authority to the holder of said bond, in case of non-payment of either principal or interest when due, to foreclose said mortgage, or to take such other legal remedy on said note and mortgage against said mortgagor or against said company on said bond, or on both, as should seem proper or expedient to the holder thereof.

The plaintiff further shows and alleges that, in and by said coupons annexed to said bond, the said railroad company promised to pay to the holder at the American Exchange Bank, in the city of New York, said interest semi-annually, on the first days of January and July in each and every year until the maturity of said bond.

The plaintiff further shows and alleges that the said Milwaukee & Superior Railroad Company delivered the said bond with said note and mortgage thereto attached for a good and valuable consideration, and before the maturity thereof, unto the above-named H. A. Fallert & Co., and thereafter and before maturity thereof, for value, the same law-
26 fully came into the possession of this plaintiff, and that the plaintiff is the lawful holder and owner of said bond and of the coupons for the interest due from and since the first day of July, 1857, and that he is, also, the lawful holder of said note and mortgage.

And the plaintiff further shows and alleges that the whole principal sum of said bond and the interest thereupon from and since the first day of July, 1857, remains unpaid. And that neither the makers or any other person have or has ever paid the amount agreed to be paid in and by said note and mortgage or any part thereof, excepting the interest thereupon up to the first day of July, 1857, and that the whole principal sum of said note & mortgage, together with interest thereupon at the rate of eight per cent. p'r annum from and since the first day of July, 1857, is due and unpaid on said note and mortgage.

And the plaintiff further shows that no proceedings have been had at law, or otherwise to his knowledge or belief, for the recovery of the sum secured by the said note or mortgage or any part thereof. And the plaintiff further shows that he is informed and believes that the above-named defendants, Deney Case, Mary L. Case, Alanson Case, Seymour Case, George W. Foster, George A. Rowe, Joseph Mann, E. T. Turner, & John Müller have or claim to have some interest in or lien upon
27 said mortgage premises, or some part thereof, which interest or lien, if any, has accrued subsequent to the lien of said mortgage, and is subject thereto. That in or about the year 1862, Orin Case, one of the said mortgagors, died intestate, leaving him surviving the above-named Deney Case, his wife, and the above-named defendants Austin Case, Alanson Case, and Seymour Case, his only children and heirs; that no proceedings, to the knowledge of this plaintiff, has ever been had in probate relating to the estate of said deceased, nor any administrator ever been appointed; that Mary L. Case, one of the defendants above named, is the wife of Austin Case, one of the mortgagors.

And this plaintiff further shows that in and by said mortgage it was expressly covenanted and agreed by the parties executing the same, as before stated, that in case of foreclosure thereof by reason of the non-

performance of any of the conditions therein contained, they would pay the sum of fifty dollars for solicitors' fees.

The plaintiff therefore demands that the defendants, and all persons claiming under them, subsequent to commencement of this action, may be barred and foreclosed of all right, claim, lien, and equity of redemption in the said mortgaged premises; that the said premises may be decreed to be sold according to law; that out of the moneys
28 arising from the sale, the plaintiff may be paid the amount due on said note and mortgage, and the costs and expenses of this action, together with the said sum of fifty dollars, solicitors' fees, so far as the amount of such moneys properly applicable thereto will pay the same, and that the defendant Austin Case may be adjudged to pay any deficiency after applying all of said moneys so applicable thereto; and that the plaintiff may have such other and further relief, or both, in the premises as shall be just and equitable.

MANN & COTZHAUSEN,
Plaintiff's Attorneys.

STATE OF WISCONSIN,
County of Milwaukee, ss:

Henry Kirchhoff, being duly sworn, says that he is the plaintiff in this action; that the foregoing complaint is true, to his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

HENRY KIRCHHOFF.

Subscribed and sworn to this 17th day of December, 1869, before me.
FRED. SCHRIBER,
Notary Public, Milwaukee Co., Wis.

29 Circuit court, Ozaukee County.

HENRY KIRCHHOFF
against
DENEY CASE, AUSTIN CASE, MARY L. CASE, Alanson Case, Seymour Case, George W. Foster, George A. Rowe, Joseph Mann, E. S. Turner, & John Muller.

Due service of a copy of the complaint in the above entitled action on the undersigned attorney for the above-named defendants, Georg' W. Foster, George A. Rowe, & John Mullen, is hereby admitted & acknowledged.

Dated Ozaukee, January 26th, 1870.

A. L. COE,
Atty. for Deft, Georg' W. Foster, George A. Rowe, & John Mullen.

Affidavit of . No answer.

Circuit court, Ozaukee County.

HENRY KIRCHHOFF
against
DENEY CASE, AUSTIN CASE, MARY L. CASE, Alanson Case, Seymour Case, George W. Foster, George A. Rowe, Joseph Mann, E. S. Turner, & John Müller.

COUNTY OF MILWAUKEE, *ss:*

J. E. Mann, one of the plaintiff's attorneys, in this action, being

duly sworn, says that no copy of an answer or demurrer to the complaint in this action hereto annexed has been received, nor has
30 any notice of retainer been served therein except on part of the defendants George W. Foster, George A. Rowe, & John Müller, there being no appearance on part of the other defendants.

J. E. MANN.

Sworn to before me this 15th day of June, 1870, before me.

FRED. SCHRIBER,
Notary Public, Milwaukee Co., Wis.

Circuit court, Ozaukee County.

HENRY KIRCHHOFF
a.
DENEY CASE, AUSTIN CASE, MARY L. CASE, Alanson Case, Seymour Case, George W. Foster, George A. Rowe, Joseph Mann, E. S. Turner, & John Müller.

It appearing to my satisfaction, by the affidavit of Henry Kirchhoff, the plaintiff in this action, and sheriff's return to the summons thereto annexed, that Deney Case, Austin Case, Alanson Case, Mary L. Case, Seymour Case, & George A. Rowe, six of the above-named defendants, are non-residents of this State, and that neither of them can, after due diligence, be found within this State, so that a personal service of the summons can be made upon them, but are absent from the same,
31 and that the residence of either or any of them is neither known to the plaintiff in this action, nor can, with reasonable diligence, be ascertained by him. And it further appearing that this action is one of which this court has jurisdiction, so that a cause of action exists against said defendants, and that they are necessary and proper parties to said action, (it being an action relating to real property in this State, viz, the foreclosure of a mortgage on lands lying in the county of Ozaukee, in this State,) that the said Deney Case, Austin Case, & Mary L. Case are made parties defendants in said action, as being the mortgagors named in said mortgage who are now living, and that the said Alanson Case & Seymour Case are children and heirs at law of one Orin Case, now deceased, one of the mortgagors named in said mortgage, and that they, the said Alanson Case, and Seymour Case, as well as the said George A. Rowe, are made parties defendants in this action, as having or claiming some lien or interest, actual or contingent, in the said mortgaged premises, and that such lien or interest is subsequent and subject to the lien of said mortgage, and that the relief demanded in this action consists wholly in excluding the said defendants from any interest or lien in the said mortgaged premises, except the right of redemption allowed by law.

32 It is therefore ordered that the summons in this action be served on the said defendants, Deney Case, Mary L. Case, Alanson Case, Seymour Case, and George A. Rowe, by publishing the same in the Ozaukee County Advertizer, a weekly newspaper published in the village of Port Washington, in the county of Ozaukee, once a week for six weeks successively.

Dated January 11th, 1870.

EDWARD M. HUNTER,
Court Commissioner.

(Endorsed:) "Filed July 13, 1870. H. Boclo, clerk."

Circuit court of Ozaukee County.

HENRY KIRCHHOFF
agst.
DENCY CASE, AUSTIN CASE, ALANSON CASE, Seymour Case, Mary Case, George W. Foster, George A. Rowe, Joseph Mann, E. S. Turner, & John Miller.

The defendants, George W. Foster, George A. Rowe, & John Miller, deny that the interest which they claim in the premises mentioned in the complaint has accrued subsequent to the said mortgage or is subject thereto.

And the defendant George W. Foster, further answering, shows that on or about the 18th day of December, 1862, a tax-deed was duly
33 issued to one Benjamin A. Jenkins by the clerk of the board of supervisors of Ozaukee County, as such clerk, of said premises; that subsequently the said George W. Foster purchased the said premises from the said Jenkins, he, the said Jenkins, having no other title than through the tax-deed above mentioned, paying him in cash, as a consideration for such purchase, about the sum of five hundred and fifty dollars.

That, in pursuance of such purchase, the said Benjamin A. Jenkins conveyed the premises in fee to the said George W. Foster by deed dated Sept. 12, 1864; that immediately upon his said purchase, he, the said Foster, took possession of said premises under and by virtue of said purchase by him from the said Jenkins; that on or about the 1st day of January, 1866, he sold the west half of the said premises for a valuable consideration to the said Mary L. Case, one of the above-named defendants; that in pursuance of such sale he subsequently deed' the said west half so sold in fee to her, to wit, in December, 1866; that he remained in possession of the east half of the premises described in the mortgage until some time in the spring of 1869, when he sold it by contract to the defendant John Miller for the sum of twelve hundred dollars; and upon the making of the said contract he gave pos-
34 session of said east half to the said John Miller, who has retained possession of the same under and by virtue of said contract until the present time.

And the said George A. Rowe, further answering for himself, shows that on the 18th day of May, 1869, he purchased from said Mary L. Case the west half of the premises described in said mortgage, she, on the same day, conveying the same to him by warranty-deed; that the consideration mentioned in the said deed from her to him was twenty-five hundred dollars; that the actual consideration was one hundred & twenty acres of land in Iowa and four hundred dollars in money; that immediately upon making such purchase, & in pursuance thereof, he went into possession of said premises and remained in possession until the 8th day of Sept., 1869, when he leased the same to the said defendant John Miller, who thereupon went into possession and is still in possession by virtue of said lease; that when he so purchased from the said Mary L. Case, as above mentioned, he suppposed her title originated in the said tax-deed to Benjamin A. Jenkins.

And the said John Miller, further answering for himself, shows that his interest in said premises is by virtue of the contract from the
35 defendant George W. Foster to him, mentioned in the above answer of the defendant George W. Foster, and the lease men

tioned in the above answer of the defendant George A. Rowe; that the statements in said answer in respect to said contract and lease are true.

H. L. COE,
Atty. for Defts. Foster, Miller, and Rowe.

OZAUKEE COUNTY, *ss:*

George W. Foster, one of the above-named defendants, being sworn, says that he and the said defendants, Miller & Rowe, are united in interest; that the foregoing answer is true to his own knowledge except as to matters therein stated on information and belief, and as to such matters he believes it to be true.

G. W. FOSTER.

Sworn to before me Feb'y 15, 1870.

J. W. LUTFRING,
Court Commissioner.

Order of referenee.

Circuit court, Ozaukee County.

HENRY KIRCHHOFF
against
DENEY CASE ET AL.

Judgment in the action as above entitled having been taken in favour of the plaintiff, and it appearing to the court that service of the
36 summons on several of the defendants in this suit has been made by publication pursuant to order heretofore duly made, and that such defendants are absentees;

On motion of Messrs. Mann & Cotzhausen, attorneys for the plaintiff, it now is ordered that this cause be referred to W. A. Pars, esq., a commissioner of this court, to take proof of the facts and circumstances stated in the complaint; to examine the plaintiff or his agent on oath as to any payments which may have been made on the mortgage or accompanying evidence of debt; to compute the amount due to the plaintiff herein, and whether there are any prior encumbrancers made parties defendants, and whether any part of the mortgaged premises constitute the homestead of the mortgagors; and that said referee make report to this court with all convenient speed.

Dated at Port Washington, this 13th day of July, A. D. 1870.

By the court.

D. J. PALLING, *Judge.*

State of Wisconsin, circuit court, Ozaukee County.

HENRY KIRCHHOFF, PLAINTIFF,
against
DENEY CASE ET AL., DEFENDANTS.

37 To the circuit court of Ozaukee County:

In pursuance and in virtue of an order of reference made in the above-entitled action, bearing date the 13th day of July, 1870, by which it was referred to the undersigned, as referee, to compute and ascertain the amount due upon the note and mortgage set forth in the plaintiff's complaint in the above-entitled action, for principal and interest re-

spectively, and that he report thereon to this court with all convenient speed, and to take proof of the facts and circumstances stated in the complaint, and to examine the plaintiff or his agent on oath as to any payments which have been made, to ascertain whether there are any prior incumbrancers made parties defendants, and whether any parts of the mortgaged premises constitutes the homestead of the debtors or mortgagors;

I, William A. Pars, referee, do hereby certify and report that I have computed and ascertained the amount due the plaintiff upon the note and mortgage set forth in the plaintiff's complaint in the above-entitled action for principal and interest respectively up to and including the date of this my report, and I find, and accordingly report, that there is now due and owing upon said note and mortgage the sum three
38 thousand & sixty-four dollars and twenty-five cents; and that I have examined Henry Kirchhoff, the plaintiff, under oath as to the facts and circumstances stated in the complaint, and as to payments which have been made, and find that the facts as stated in the complaint are true, and that no payments have been made except as stated therein. I also report that no prior encumbrancers who have not appeared have been made parties defendants herein, & that no part of the mortgaged premises constitute the homestead of the mortgagors.

Schedule A, hereunto annexed, forming part of this my report, shows a statement of the principal and interest respectively, the period of the computation of the interest and its rate, reference being thereunto had. All of which is respectfully submitted.

Dated Port Washington, 13th day of July, A. D. 1870.

WILLIAM A. PARS, *Referee.*

Schedule A, referred to in the preceding report.

A note for $1,500.00, dated 27th day of October, 1856, with interest at 8 per cent. per annum.

Principal sum due	$1,500 00
Interest thereon from July 1st, 1857, to July 13, 1870, being 13 years, months, and 13 days, at 8 per cent. per annum	1,564 25
Amount due plaintiff 186'	$3,064 25

Dated Port Washington, 13th July, A. D. 1870.

WILLIAM A. PARS, *Referee.*

39 At the special term of the circuit of the State of Wisconsin, held in and for the county of Ozaukee, at the court-house in the village of Port Washington, on the 13th day of July, A. D. 1870.

Present the Hon. David J. Pulling, circuit judge.

HENRY KIRCHHOFF
against
DENEY CASE, AUSTIN CASE, MARY L. CASE, Alanson Case, Seymour Case, George W. Foster, George A. Rowe, Josept Mann, E. S. Turner, & John Müller.

On reading and filing the return of the sheriff of Ozaukee County, proving service of the summons and notice of object of action on the defendants George W. Foster, E. S. Turner, & John Müller, and the return of the sheriff of Milwaukee County, proving service of said sum-

mons and notice of object of action on the defendant, Joseph Mann, and the affidavit of publication, proving service of summons on the other defendants, whose residence is unknown and cannot after due diligence be ascertained, and the affidavit of John E. Mann, one of the plaintiff's attorneys, of no answer or appearance, except as to George W. Foster, George A. Rowe, & John Müller, who set up adverse title in themselves, derived under a tax-title or tax-deed, said to have been issued on or about the 18th day of December, 1862, by the clerk of the board of supervisiors of Ozaukee Co., to one Benj. A. Jenkins, and which asserted title they claim to be paramount to the lien of the plaintiff's mortgage; and the plaintiff and said defendants having in open court elected and consented not to try said question of adverse title under said tax-deed in this foreclosure suit, but to litigate the same in other manner and proceedings separately instituted.

And it appearing from proof taken in open court, that due notice of the pendency of the action was duly filed in the office of register of deeds of the county of Ozaukee on the 22d day of December, 1869, and an order of reference having been made to compute the amount due the plaintiff upon the note and mortgage set forth in the complaint; to take proof of the facts and circumstances stated in the complaint; to examine the plaintiff or his agent on oath as to any payments which have been made on the mortgage or accompanying evidences of debt; and to ascertain whether there were any prior incumbrancers made parties defendants, and any part of the mortgaged premises constituted the homestead of the mortgagors.

And on reading and filing the referee's report, bearing date July 13th, 1870, whereby it appears that the facts as stated in the complaint are true; that no payments have been made except as stated therein; that there are no prior incumbrancers made parties defendants; that no part of the mortgaged premises constitute the homestead of the mortgagers; and that there is due thereon at the date of said report the sum of three thousand and sixty-four dollars and twenty-five cents, ($3,064.25.)

It now is ordered and adjudged by this court that the said report be, and the same hereby is, confirmed, and on motion of Mann & Cotzhausen, plaintiff's attorneys, it is adjudged that the mortgaged premises described in the complaint in this action, as hereinafter set forth, or so much thereof as may be sufficient to raise the amount due to the plaintiff for principal, interest, and costs, and which may be sold separately, without material injury to the parties interested, be sold at public auction, in the county of Ozaukee, by or under the direction of the sheriff of said county; that the said sheriff give public notice of the time and place of such sale according to law, and the practice of this court; that either or any of the parties to this action may purchase at this sale; that ths said sheriff execute to the purchaser or purchasers a deed or deeds of the premises sold; that out of the moneys arising from such sale, after deducting the amount of his fees and expenses on such sale, the said sheriff pay to the plaintiff or his attorneys the sum of eighty-four dollars and forty-nine cents, adjudged to the plaintiff for costs and charges in this action, and also the sum of fifty dollars, which is hereby allowed and adjudged to the plaintiff in addition to said costs, pursuant to the mortgage, making together the sum of one hundred thirty-five dollars and forty-nine cents, with interest from the date hereof, and also the amount so reported due as aforesaid, together with legal interest thereon from the date of said report, or so much thereof as the purchase-money of the mortgaged premises will pay of the same, take a

receipt therefor and file it with his report of sale: that he bring the surplus moneys arising from said sale, if any there be, into court without delay, to abide the further order of this court; that he make a report of such sale and file it with the clerk of this court, with all convenient speed; that if the proceeds of such sale be insufficient to pay the amount so reported due to the plaintiff, with the interest & costs as aforesaid, the said sheriff specify the amount of such deficiency in his report of sale; and that the defendant, Austin Case, pay the same to the plaintiff, and that the purchaser or purchasers at such sale be let into possession, on the production of the sheriff's deed and a cer-
43 tified copy of the order confirming the report of sale.

And it is further adjudged that the defendants and all persons claiming under them, or any or either of them, after the filing of such notice of the pendency of this action, be forever barred and foreclosed of all right, title, interest, and equity of redemption in the said mortgaged premises so sold, or any part thereof, excepting, however, the asserted title or interest, if any such there be, of George W. Foster, George A. Rowe, & John Müller, in and to the mortgaged premises, under and by virtue of the tax-deed said to have been issued on or about the 18th of December, 1862, by the clerk of the board of supervisors of Ozaukee County to one Benjamin A. Jenkins, the grantor of said defendants as above referred to, and in the answer of said defendants particularly set forth.

The following is a description of the mortgaged premises hereinbefore mentioned.

"The west half of the northeast quarter of section thirty-three, (33,) town. twelve (12) north, range twenty-one (21) east, in the county of of Ozaukee, State of Wisconsin."

Dated at Port Washington this 13th of July, A. D. 1870.

By the court.

D. J. PULLING, *Judge.*

44 *Minutes of the clerk.*

April term, 1870.

HENRY KIERCHOFF
vs.
DENCY CASE, AUSTIN CASE, MARY L. CASE, Alanson Case, Seymour Case, George W. Foster, George A. Rowe, Joseph Mann, E. S. Turner, & John Müller.

Dec. 23, 1869.	Filed summons & complaint.
April 7, 1870.	Filed affidavit of publication.
June 21, 1870.	Filed notice of trial & note of issue.
July 12, 1870.	Filed affidavit of no answer.
" " "	" mortgage & farm-mortgage & note.
" " "	" notice of pendency of action.
" " "	" notice of retainer.
" " "	" admission of service of copy of complaint.
" " "	" copy of answer.
" " "	" summons & notice of object of action.
" " "	" order of publication of summons.
" " "	" affiidavit for order of publication of summons.
" " "	" order of reference.

" " " " referee's report of amount due.
" " " " judgment of foreclosure and sale recorded in judgment-record, on pages 154, 155, & 156.
" " " " plaintiff's bill of costs.
Sept. 30, 1870. Filed sheriff's report of sale.
45 Jan. 24, 1871. Filed notice of application for order of comfirmation.
" " " " confirmation of sale.
June 17, 1873. " affidavit of notice of motion.

Circuit court.

STATE OF WISCONSIN, *County of Ozaukee:*

I, Hugo Boclo, clerk of said court, hereby certify that the foregoing is a true & correct transcript and the whole of the entries made in the minute-book kept in my office in the above-entitled case, and further, that it is all the entries pertaining to said case on the books herein, except the order for publication of summons, the order of reference, and the judgment of foreclosure & sale.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Port Washington, this 17th day of October, 1873.

[SEAL.] HUGO BOCLO, *Clerk*,
By C. E. CHAMBERLIN, *Dep'ty.*

It was admitted that these minutes of the clerk might be received as if the papers and documents therein referred to were copied and certified in full.

It was admitted that there was proof of publication of the summons in the case.

46 The defendants objected to the admission of the judgment-roll in evidence, which objection was overruled, to which decision of the court the defendants then and there excepted.

The defendants then offered to prove, and did prove, subject to objection by the plaintiff, that Edward M. Hunter, named in the said judgment-roll as commissioner, had never been commissioner of the county of Ozaukee, but was commissioner, of the county of Milwaukee, and thereupon moved to exclude the said judgment-roll as evidence in the case as incompetent, but the court was of opinion that the defendants could not attack the decree of the circuit court of Ozaukee County in this collateral action, and therefore overruled the motion, to which the defendants then and there excepted.

The plaintiff then proved that he became the purchaser at the sale under the decree of foreclosure, and that a deed in due form of law was made to him, conveying to him on the 30th of Sept., 1870, all the title of Orin & Austin Case to the land in controversy at the date of the said mortgage, so far as said proceedings and decree could convey the same, which sale and deed were duly confirmed by the court.

The plaintiff then proved that the land in controversy was occupied, by actual residence thereon, either by Orin or Austin Case and
47 their respective families from 1850 to 1869, and that there was no apparent change of possession during that time.

And thereupon the plaintiff rested his case.

The defendants then offered, subject to objection, a tax-deed for the land in controversy, among other tracts, from the county of Ozaukee to Benjamin A. Jenkins, of Dec. 18, 1862, to wit:

48 *Ozaukee County to B. A. Jenkins—Tax-deed.*

To all to whom these presents shall come, greeting:

Whereas Benjamin A. Jenkins, assignee of county treasurer, has deposited in the office of the clerk of the board of supervisors of the county of Ozaukee, in the State of Wisconsin, ten and one-third certificates of the treasurer of said county, John Simon by U. Landost, dept., whereby it appears (as the fact is) that the following described pieces or parcels of land lying and being situated in the county of Ozaukee, to wit:

The northeast quarter of the southeast quarter of No. five, town. ten, (10,) range twenty-one (21) east, containing 40 acres of land, more or less, and was sold for $9\frac{94}{100}$ dollars.

Also the northeast quarter of the northeast quarter of section No. fifteen, (15,) town. No. twelve (12) twenty-two (22) east, containing 40 acres of land, more or less, and was sold for the sum of $7\frac{36}{100}$ dollars

Also the southeast quarter of the southeast quarter of section No. ten, (10,) town. twelve, (12,) range twenty-two (22) east, being 40 acres of land, more or less, and was sold for $7\frac{40}{100}$ dollars.

49 Also the west half of the northeast quarter of section thirty-three, (33,) town. No. twelve, (12,) of range No. twenty-one (21) east, being 80 acres of land, more or less, and was sold for $9\frac{94}{100}$ dollars.

Also the northeast quarter of the northeast quarter of section No. eight, (8,) town. twelve, (12,) range No. twenty-one (21) east, being 40 acres of land, more or less, was sold for $7\frac{86}{100}$ dollars.

Also the south half of east half of the northeast quarter-section No. ten, (10,) town. eleven, (11,) range No. twenty-one (21) east, being 40 acres of land, more or less, and was sold for $8\frac{12}{100}$ dollars.

Also the northwest quarter of section No. thirty, (30,) town. ten, (10,) range twenty-two (22) east, containing 160 acres of land, more or less, and was sold for $51\frac{80}{100}$ dollars.

Also the north half of the northeast quarter of section No. ninneteen, (19,) town. ten, (10,) range No. twenty-two (22) east, being 80 acres of and, and was sold for $27\frac{60}{100}$ dollars.

Also the north half of the north half of the south half of the southeast quarter of section No. four, (4,) town. No. ten, (10,) range No. twenty-two (22) east, being 20 acres of land, more or less, and was sold for the sum of $4\frac{58}{100}$ dollars.

50 Also the northwest quarter of the southeast quarter of section No. fifteen, (15,) town. No. twelve, (12,) range No. twenty-two (22) east, containing 40 acres of land, more or less, and was sold for the sum of $7\frac{36}{100}$ dollars.

Also the north $26\frac{2}{3}$ acres of the east half of the southwest quarter of section No. nine, (9,) town. No. ten, (10,) range No. twenty-two (22) east, and was sold on the 14th day of October, A. D. 1859, for the sum of $8\frac{48}{100}$ dollars.

All of the above tracts, excepting the tract last described, were, for the non-payment of taxes, sold by the treasurer aforesaid at public auction, at the county treasurer's office, in the village of Port Washington, in said county of Ozaukee, on the 11th and on the 14th day' of October, (last-mentioned tract,) in the year of our Lord one thousand eight hundred & fifty-nine, to the said county treasurer, assignor aforesaid, for the sum of one hundred & fifty-eight dollars & fifty-seven cents in the whole; which sum was the amount of taxes assessed and was due and unpaid on said tracts of land, together with the costs and charges of such sale, due therewith at the time of making such sale, the whole

of which such sum of money has been paid by the aforesaid purchaser. And whereas it further appears (as the fact is) that the owners or claimants of said lands have not redeemed from said
51 sale the lands which were sold as aforesaid, and said lands are now unredeemed from such sale, whereby said described lands have become forfeited, and the said purchaser, his heirs or assigns, is entitled to a conveyance thereof.

Now, therefore, know all men by these presents, that the county of Ozaukee, in said State, and the State of Wisconsin, in consideration of the said sum of money aforesaid and the premises, and in conformity to law, hath, and hereby doth give, grant, and convey the tracts of land above described, together with the hereditaments & appurtenances to the said Benjamin A. Jenkins and his heirs & assigns, to their sole use & benefit forever.

In testimony whereof I, Bartholomew Harrington, the clerk of the county board of supervisors of the county of Ozaukee, have executed this deed pursuant to and in virtue of the authority in me vested by the statutes of the State of Wisconsin, and for and on behalf of the said State, and of the county of Ozaukee aforesaid, have hereunto subscribed my name officially, and affixed the seal of the said county board of supervisors, at my office in the village of Port Washington, in the said county, this 18th day of December, in the year of our Lord one thousand eight hundred and sixty-two.

52 BARTHOLOMEW HARRINGTON, [SEAL.]
Clerk of Board of Supervisors of Ozaukee County, Wisconsin.

Done in presence of—
G. GOETZE,
PETER HARRINGTON.

STATE OF WISCONSIN, *Ozaukee County, ss:*

Be it remembered that on this 18th December, 1862, before me personally came Barth. Harrington, clerk of the county board of supervisors of Ozaukee County, who executed the above deed, and acknowledged the execution thereof by him as such clerk of the said county board of supervisors, for the uses & purposes therein mentioned.

GUSTAV GOETZE,
Justice of the Peace.

Received for record Dec. 22, 1862, at o'cl. a. m.
A. AHLHAUSER, *Register*,
P'r J. C. DOWNS, *Dept.*

In vol. 13, p. 423.

REGISTER'S OFFICE, OZAUKEE COUNTY:

I, Gustav Goetze, register of deeds for Ozaukee County, in the State of Wisconsin, do hereby certify that I have carefully compared the foregoing deed with the orginal deed now of record in my office; that the same is a correct transcript therefrom and of the whole thereof.

Witness my hand and official seal at Port Washingson, Wis., this 30th day of September, 1871.

[SEAL.] GUSTAV GÖTZE, *Register.*

53 The defendants then proved that Jenkins conveyed the land

in controversy to George W. Foster, by deed of Sept. 12, 1864, (the consideration named in the deed was $35, and it was recorded April 9, 1869,) and that George W. Foster conveyed the west forty acres to Mary L. Case, by deed of Dec. 1, 1866; and that Mary L. Case conveyed the west forty acres to George A. Rowe, by deed of May 16, 1869, and that George W. Foster leased the east forty acres to Mary L. Case for three years, from Jan'y 1, 1866; and that George A. Rowe leased the west forty acres to Mary L. Case till Oct. 1, 1869, and that George A. Rowe leased the west forty acres to John Müller (defendant) for three years, from the 15th of Oct., 1869.

The defendants also proved that George W. Foster had made a contract to sell the east forty acres to John Müller.

The defendants then called George W. Foster as a witness, who proved and testified as follows:

54 GEO. W. FOSTER, being sworn, testifies as follows:

A deed, as I stated to your honors, from Jenkins to me, is dated the 12th day of Sept., '64. It was actually delivered to me—the bargain was made some time in July, 1865. And immediately upon taking the deed, I told Mr. Case that he could remain there until the first of Dec., 1865, giving him a parole lease or permission. It is possible it was the first of January, but my recollection is the first of Dec.

The consideration I paid I cannot tell precisely, but it was somewhere in the neighborhood of—well, perhaps I have stated it in the answer. I will look & see. It was $550.00 in cash. The consideration expressed in the deed from Mary L. Case to Geo. A. Rowe is $2,500.00. The actual consideration was $400.00 cash & 120 acres of land in Iowa, that was selling at the time at from 5 to 8 dollars an acre. It
55 was rather a trade than a purchase. I cannot recollect the name of the county. It is not very far from the Missouri River, in the coal region. It was considered a valuable tract of land.

Cross-examination:

Q. Where is the original deed, quit-claim, from Jenkins to yourself, which bears date Sept. 12th, & was acknowledged on the 16th of Sept., & not recorded until April, '69?

A. I don't believe that I am able to tell where the deed is. I get deeds recorded & seldom think or look after them after that.

Q. Did you ever search for it?

A. No. I don't think I have.

Q. When did you last see it?

A. I don't remember.

Q. When did you first miss it?

A. I don't think I ever missed it, or thought of it at all.

Q. Who brought it to the recorder's office in '69, five years after it had been executed?

A. I have no doubt but what I did it myself, but then I could not swear to it. I have no recollection of the fact.

Q. From whom did you receive that deed?

A. From Eugene S. Turner.

56 Q. Who was Eugene S. Turner?

A. A citizen at Port Washington.

Q. He was attorney of Jenkins in '64, was he not?

A. How do you mean, attorney in fact or attorney at law?

A. Well, both; I suppose he was both.

Q. The deed states a consideration of $35.00 & you swear that the actual

consideration paid was in the neighborhood of $550.00. Will you please to explain? Why was that $35.00 inserted in the deed?

A. Well, that is very easily explained. And there are records of the court which I can well use in connection with the testimony. On the 26th of July, '64, Benj. A. Jenkins commenced an action against Austin Case to foreclose this tax-deed. I was employed as Mr. Case's attorney to defend the foreclosure, & demurred to the complaint on the ground that the tax-deed appeared to be void on its face. And Judge Mann, Mr. Cotzhausen's partner, & one of the attorneys in this action, was judge of the circuit at that time. He decided that the deed was good. He decided against me.

Q. Will you please to let the record speak for itself, & not substitute your testimony?

57 A. Yes; I was just going to read it to the court. He at the the same time commenced a foreclosure of a mortgage. No, I won't say at the same time, but on the 27th day of March, '65. He commenced the foreclosure of a mortgage executed by Austin Case on the same premises to one Mann, or a part of the premises.

COURT. State the facts.

A. The demurrer being overruled, Mr. Case said that he could not pay the mortgage, & he could not pay what Mr. Turner asked for the tax-deed. I then asked Mr. Turner to sell the tax-deed to me, & he figured up what he would take for it, & in that figuring of what he would take for the tax-title he put in the amount of the mortgage that he was foreclosing. I told him if the tax-title was good I cared nothing about the mortgage. But he would not sell it for any less amount than was sufficient to pay up all his claims. There were some judgments, but I can't tell how many. He would not sell the tax-title unless he could get enough to pay all the claims, & he figured up what there were, & I paid them, & he delivered to me the deed?

Q. That was in the neighborhood of $550.00?

A. Yes, sir; I could figure it up.

58 Q. Did you on the first trial of this case here before his honor, Judge Miller, swear that the actual consideration of the deed from Jenkins to Foster was in the neighborhood of a thousand dollars?

A. Well, I may have sworn to that; I don't recollect. But what I swear to here now is the answer that is put in. I do not recollect all of the details of the facts, but I do remember this, that Turner figured up these amounts, & we could figure them over again, because they are all in memoranda.

Q. Can you tell us now whether it was in the neighborhood of $550, or in the neighborhood of $1,000?

A. Well, if you will give me a few minutes, I will answer you. It was all that he claimed, at any rate.

Q. Did you ever go into the possession of this so-called Case farm; & if so, when?

A. The question of possession perhaps is a question of law, but I will state the facts. Mr. Case & Mrs. Case said that they would hold the premises there until Dec., '65, & there was no further arrangement made about it except that he was to pay the road taxes, & that was not in writing.

Q. Now answer my question.

A. Well, I thought I was answering it.

59 Q. No, sir; I have got no answer to my questions yet.

A. Well, then, repeat the question.

Q. Did you ever take possession of the Case farm?

A. Welll I got so far that they could remain there. The first of Dec.

run along until the first of Jan., & we did nothing. On the first of Jan., '66, I took the actual possession of the east half, & sold to Mary L. Case the west half. Possibly I am incorrect as to dates, but the papers will show for themselves.

Q. Then you never went into the possession of the west half of the farm which you sold to Mary L. Case?

A. Except as I have told you.

Q. And you never went into the possession of the east half of that farm except by executing a lease Jan. first, '66, to Mrs. Chase, & afterwards a land-contract to Mr. Miller, when the Case family moved away?

A. And receiving rent.

Q. You never had any other possession except under the lease that you executed to Mrs. Case Jan. first, '66?

A. Except by leasing it to the people about there for pasturing their cattle. It was not possessio pedis. My own feet & hands did not work it.

60 Q. Case's folks were in possession until they moved away under your lease?

A. The first of Jan., '66, I leased to Mary L. Case the east half, to continue 3 years, to the first of Jan., 1869.

Q. The consideration stated in that lease was one dollar per year & taxes?

A. Yes, sir; but that was not the actual consideration. The facts that I state are notorious to everybody.

Q. The consideration of rent stated in your lease is one dollar per year & taxes, isn't it?

A. Well, I guess it does not state one dollar per year, but one dollar, paying all taxes. Yes, it does say one dollar per year.

Q. George A. Rowe, the present owner of the west 40, is your brother-in-law & partner, is not he?

A. Not partner, but brother-in-law.

Q. He was your partner until a short time ago, was he not?

A. He was not at the time of this transaction.

Q. He was your partner until a short time ago in your commercial business?

A. To what time I cannot answer without some limit to the question. He has been a partner of mine. The partnership commenced in—— well, we owned a mill together, & we purchased the mill-property

61 together in May, '69.

Q. When Mr. Rowe purchased the west 40 from Mrs. Case, you were the attorney of Mr. Rowe, & perfected the purchase for him?

A. Yes, sir.

Q. When Mr. Rowe gave a lease to Mrs. Case for some 9 months after the purchase made by him, you signed that lease as attorney in fact for Mr. Rowe, did you not?

A. The lease shows it.

Q. Mr. Rowe was not personally present at any time when the several documents were exchanged between you & Mrs. Case?

A. He was present at the time the deed was given.

Q. The original lease from Mr. Rowe, signed by yourself as attorney in fact, is here in court. Now, where is the original lease from Foster to Mrs. Case, under date of Jan. first, '66?

A. I presume that Mrs. Case has it, but I am not certain. I have not got it among my papers.

Q. The lease executed by you purports upon its face to be a copy not authenticated. Is that so?

A. Yes; it is a duplicate, so far as I am concerned, because I
62 signed both, but she signed but one.

Q. Why is it that all of the papers which were, as you state, executed & delivered by yourself, or executed by yourself, there is not a single original here in court?

A. Well, I guess there are two or three of them here.

Q. Well, point them out.

A. There is the land-contract, Miller. That is one, & here is——

Q. Did not Mr. Austin Case pay these taxes which these receipts call for?

A. I am unable to say. I rather think they were paid on that lease. But Miller was owing me, & he was town treasurer, & he may have deducted it from what he was owing me.

Q. What is that?

A. I say I think very likely they were, but I cannot tell. Mr. Miller, the town treasurer, was also owing me, & the receipt is brought to me by him, but whether he paid them out of what he was owing me, or whether they were paid out of the lease, I am unable to say. I cannot tell now.

COURT. The tax-receipts run to you?

A. Yes, sir.

Q. Since Mr. Austin Case left for Minnesota, the taxes on that 80-acre farm have remained unpaid, have they not, Mr. Foster?

63 A. I cannot say any further than will be shown by the record. I have an agreement with Miller to pay them.

Q. You had business dealings with Austin Case at the time when the tax-deed was bought by you, didn't you?

A. Well, as I have stated, as attorney in the action of Jenkins against Case, & no further.

Q. You referred to the foreclosure-suit of Eugene S. Turner vs. Austin Case. It was the foreclosure of a second mortgage, was it not, on those premises?

A. I guess it was, but I would not say so without looking at the papers.

Q. You appeared as the attorney of Austin Case in that case, did you not?

A. I don't remember, but I will look & see.

Q. Can you tell me whether you became the purchaser at that foreclosure-sale, in Nov., '66?

A. There is a certificate issued to me, & that would show that I was the purchaser; but I never paid any money.

Q. Was the sale confirmed to you by the court?

A. I cannot say without looking.

Q. Did you pay anything on that sale, aside from the costs & sheriff's fees?

A. I paid nothing at all. I paid all of Mr. Mann's demands when I purchased the tax-title.

64 Q. Did you testify, on the first trial of this case, that in the purchase of that property on the second foreclosure, you paid the costs of the foreclosure & sheriff's fees, on the sale?

A. It may be, but I don't recollect now of having paid, but if I testified so, that was my recollection then. That was some time ago.

Q. That's all.

COURT. Let us understand, Mr. Foster, on what ground you put this tax-title. Do you put it on the ground in the first place that it is good on its face & is an absolute title?

A. Yes, sir.

Q. Then do you claim (if it is not good on its face) a defence under the statute of limitations?

A. Yes, sir.

Q. What is your statute on that subject?

A. Well, perhaps we shall differ on that subject. There has been a good deal of legislation on that subject & many decisions. That we shall argue afterwards.

Q. Point out under what statute you claim.

A. Well, the statute of '62, (it should be 1861.) I believe it is. The statute of '59 prescribes the form of deed, & the statute of '62 (1861) prescribes the limitation.

Q. That's all.

65 The defendants also proved the payment of taxes on the land, the tax-receipts being given in the name of Foster for the years 1865, 1866, and 1867.

The plaintiff then proved that in Sept., 1859, Orin Case & wife mortgaged his interest in the land to one Joseph Mann, which mortgage was transferred to E. S. Turner, who foreclosed the mortgage in the circuit court of Ozaukee County, in 1865. Austin Case, Dency Case, Seymour Case, & Alanson Case, the wife & children of Orin Case, (Orin Case being then dead,) were made parties. In said foreclosure suit Austin Case and Dency Case appeared by George W. Foster, their attorney. There was a regular decree of foreclosure, & the property bid in by George W. Foster, the defendant's attorney, but nothing was paid by him but the costs of sale.

The plaintiff then offered in evidence the following stipulation.

66 *Stipulation marked "X."*

Circuit court U. S., eastern district of Wisconsin.

LOUIS EHLERS
against
JOHN MUELLER & JOHN ZIMMER.

The statements, statistics, and documents hereinafter referred to or hereto annexed, are admitted to be correct, and may be made use of on the trial of the above-entitled case, as if properly authenticated or proven.

1st. The defendants were at the commencement of this suit, and are now, in possession of the premises for the recovery whereof this suit is brought.

2nd. The value of said land is three thousand dollars and more.

3d. The annexed certificate, No. 1267, is a true copy of the original on file.

4th. Memorandum from books and records of town and county treasurer, which is hereto attached.

5th. Assessment-book for the year of 1858, and all entries therein contained.

GEO. W. FOSTER,
Atty. for Defts.

67 MANN & COTZHAUSEN,
Attys. for Plff.

$9.94. *Treasurer's certificate.* No. 1267.

COUNTY TREASURER'S OFFICE,
Port Washington, Oct'b'r 11th, A. D. 1859.

STATE OF WISCONSIN, *Ozaukee County, ss:*

I, John Simon, county treasurer of the county of Ozaukee, in said State, do hereby certify that I did, at public auction, pursuant to notice given as by law required, on this eleventh day of October, A. D. 1859, sell to W. W. Tredway the land herein described, for the sum of nine dollars and ninety-four cents, said sum being the amount due and unpaid for taxes, interest, and charges on said lands for the year of our Lord one thousand eight hundred and fifty-eight; that said W. W. Tredway, his heirs or assigns, will therefore be entitled to a deed of conveyance of said lands in three years from this date, unless sooner redeemed from such sale, according to law. Said lands are described as follows, with the sums for which each tract was sold set opposite to each description. That is to say: W. ½ N. E. ¼ section 33, town. 12 N., R. 21 E., 80 acres.

JOHN SIMON,
Treasurer Ozaukee County, Wis.

By
ULRICH LANDOLT,
Deputy.

Deeded to B. A. Jenkins, Dec. 18, 1862.

68 B. HARRINGTON, *Clerk.*

(Endorsed:) Assigned to B. A. Jenkins, W. W. Tredway, deeded to B. A. Jenkins, d'c 18, 62. B. Harrington, cl'k.

From the assessment-rolls of the town of Fredonia, Ozaukee County *County*, Wis., it appears, and such is the fact, that in the year—

1858	the W ½ N. E. ¼ sec. 33, T. 12, R. 21 E.,	was assessed to Orin Case.
1859	" " " "	"
1860	" " " "	"
1861	" " " "	"
1862	" " " "	O. Case.
1863	" " " "	Orin Case.
1864	" " " "	"
1865	" " " "	Austin Case.
1866	" " " "	" "
1867	" " " "	" "
1868	W. ½ W. ½ N. E. ¼ " " " / E. ½ W. ½ N. E. ¼ " " "	G. W. Foster.
1869	W. ½ W. ½ N. E. ¼ " " " / E. ½ W. ½ N. E. ¼ " " "	Austin Case. / John Müller.
1870	W. ½ W. ½ N. E. ¼ " " " / E. ½ W. ½ N. E. ¼ " " "	Geo. W. Foster. / John Müller.

69 And it further appears from the town treasurer and county treasurer's records that the taxes assessed as above were paid to the town treasurer for the years 1859, 1860, 1861, 1862, 1863, 1864, 1865, 1866, 1867, & 1868, and that the taxes were not paid, and the land sold in the years 1858, 1869, and 1870 as follows, to wit:

The W. ½ N. E. ¼ sec. 33, T. 12, R. 21 E., was sold Oct. 11th, 1859, for the taxes of 1858, to W. W. Tredway, for 9.94. Certificate No. 1267.
The W. ½ W. ½ N. E. ¼ sec. 33, 12, 21 was sold Sept. 14th, 1870, for the taxes of 1869, to Wm. A. Thalen, for $29.55. Certif'e No. 411.
" E. ½ W. ½ E. ¼ sec. 33, 12, 21 was sold Sept. 14, 1870, for the taxes of 1869, to Wm. A. Thalen, for $26.47. Certif'e No. 412.
" W. ½ W. ½ N. E. ¼ sec. 33, 12, 21, was sold May 9th, 1871, for the taxes of 1870, to M. G. Ruppert, for $23.15. Certif'e No. 285.
" E. ½ W. ½ N. E. ¼ sec. 33, 12, 21, was sold May 9th, 1871, for the taxes of 1870, to M. G. Ruppert, for 15.43. Certif'e No. 286.

70 The plaintiff then proved by the certified records that Benjamin A. Jenkins, in 1864, commenced a suit for the foreclosure of his tax-title against Austin Case, then in the possession of the land in controversy in the circuit court of Ozaukee County, under the 22d chapter of the laws of 1859. Austin Case appeared by George W. Foster, his attorney, put in a demurrer, which was argued by counsel in January, 1865. The demurrer was overruled, and leave granted to answer, but no proceedings in said suit were ever had thereafter.

The court found, as a matter of fact, that there was an arrangement made, to which the mortgagors were parties, by which they sought to get rid of the mortgage made to the railroad company by not paying the taxes on the land, as they were obliged to do, and by letting the land be sold for taxes, and that the parties who claimed under the tax-title had reason to believe this was so.

The court found, as matter of law, that the legal title to the land in controversy was in the plaintiff, as the owner in fee-simple at the commencement of the suit.

71 2nd. That the tax-deed introduced in evidence by the defendant was invalid.

3rd. That the tax-deed was not a good defense under the statute of limitations, as it would be inequitable under the circumstances connected with the possession of the land and with the tax-title to permit it so to be.

4. That the plaintiff was entitled to recover the possession of the land in controversy.

To each and all of which findings on the facts and on the law the defendant then and there excepted.

THOMAS DRUMMOND.

72 UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

I, Edward Kurtz, clerk of the circuit court of the United States of America for the eastern district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom now on file, and remaining of record in my office, being a full and complete copy of the record and proceedings in the suit of Louis Ehlers vs. John Müller et al. as a return to the writ of error hereto annexed.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court at the city of Milwaukee, in said district, this twenty-eighth day of October, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the said United States the ninety-eighth.

[SEAL.] EDWARD KURTZ, *Clerk.*

73 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the judges of the circuit court of the United States of America for the eastern district of Wisconsin, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court of the United States of America for the eastern district of Wisconsin, before you, between Louis Ehlers, plaintiff, and John Müller and John Zimmer, defendant', a manifest error hath happened, to the great damage of the said John Müller and John Zimmer, as by the complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf; you are hereby commanded if, judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error that of right and according to law and custom of the United States should be done.

Witness the honorable Nathan Clifford, first associate justice of the said Supreme Court of the United States, this twenty-fifth day of July, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States the 98th.

EDWARD KURTZ,
Clerk U. S. Circuit Court, East'n Dist. Wis.

74 [SEAL.] The United States of America to Louis Ehlers, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Wisconsin, wherein John Müller and John Zimmer are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Nathan Clifford, first associate justice of the said Supreme Court of the United States, this twenty-fifth day of July, in the year of our Lord one thousand eight hundred and seventy-three, and of our Independence the ninety-eighth.

A. G. MILLER,
District Judge.

We accept service of above citation this fourth day of August, A. D. 1873.

MANN & COZHAUSEN,
Attys. for Louis Ehlers.

(Indorsement on cover:) No. 323. John Müller and John Zimmer, plaintiffs in error, vs. Louis Ehlers. E. Wisconsin C. C. U. S. Filed 6th November, 1873.

REC. 323—4

No. 323.

Supreme Court of the United States.

JOHN MUELLER and JOHN ZIMMER,
Plaintiffs in Error,

vs.

LOUIS EHLERS, Defendant in Error.

PLAINTIFFS' BRIEF.

MATT. H CARPENTER,
Plaintiffs' Attorney.

J. H. Yewdale & Sons, Printers, Milwaukee.

SUPREME COURT of the UNITED STATES.

JOHN MUELLER and
JOHN ZIMMER,
Plaintiffs in error.
vs.
LOUIS EHLERS,
Defendant in error.

No. 323.

PLAINTIFFS BRIEF.

The plaintiffs in error were defendants below. The parties are referred to as they stand in this Court.

The figures refer to the pages in the printed case, unless otherwise explained.

The action was ejectment; the defendant obtaining judgment, p. 5. The pleadings were a declaration and plea of not guilty, p. 12. It was tried by the Court alone, a jury having been waived, p. 3.

The record shows besides the pleadings, findings and judgment, a bill of exceptions, p. 7.

The errors alleged are:

1st. That the judgment should have been for the plaintiffs, the defendant showing no title.

2nd. That the findings of fact being special, do not sustain the conclusions of law and judgment, see findings p. 28.

3rd. Rulings on the trial, preserved in the bill of exceptions which will be stated as they are discussed.

ERROR 1.

The defendant made title only through the foreclosure of a mortgage given by Orrin Case and wife, and Austin Case and wife, p. 10. The foreclosure proceedings were in the Circuit Court of Ozaukee County, Wisconsin, p. 7.

There were no personal service on the cases, p. 8. Orrin Case is not a defendant in the foreclosure action, but it was alleged that he was dead, and that Alanson, &c., are his only children and heirs, p. 11, folio 27.

The plaintiff objected to the judgment roll, (as it showed a want of jurisdiction), p. 19, folio 46, want of personal service appearing, p.8 ,folio 19, and no other appearing. The Court overruled the objection and plaintiff excepted, p. 19, folio 46.

The only proceedings had to obtain jurisdiction of the mortgagors was under an order of Court Commissioner, Hunter, p. 30. He was not a Court Commissioner of Ozaukee County, p. 19. These two counties are in different circuits, Wis. R. S. ch., 116, sec. 1.

To obtain jurisdiction of a non-resident defendant, a certain order of publication is necessary, R. S. ch. 124, sec 10. This order should be made by some officer of the Court in which the action is pending, or of the County Judge of the county *pro hac vice* officer of such Court, R. S. ch. 124, sec. 10.

That this order cannot be made by any other officers, is apparent from the constitution of said State and several provisions of the statutes thereof, to-wit:

Art. 7, sec. 23 of the constitution provides for the appointment of a judical officer, but his jurisdiction not to exceed that of a Judge of the Circuit Court at chambers.

The legislature gave the name of Court Commissioner to this officer, and conferred upon him certain powers, R. S. ch. 13, sec. 94.

This action having been in the third circuit, no judge of the second circuit could grant such order, R. S. ch. 124, sec. 10. It follows, that a Court Commissioner of that circuit could not. It has been before shown that Milwaukee County was in the second circuit, Ozaukee in the third.

Motions and orders must be made in the circuit where the action is triable, R. S. ch. 140, sec. 29. This action was triable in Ozaukee County, R. S. ch. 123, sec. 1. The land being in Ozaukee County, p. 10, folio 22. The foreclosure action was brought in Ozaukee County, p. 7, folio 17.

There are several other provisions in the statutes that limit the jurisdiction of the Court Commissioner to his county, viz: ch. 140, sec. 31, limits his jurisdiction to the county for which he is appointed It says, "They may exercise within *their county* the powers, &c. The county can be *theirs* in no sense but as to jurisdiction. The expression is common, to indicate limit of jurisdiction, see R. S. ch 13, sec. 94. It is provided that the Circuit Judge may appoint, &c., in *their* respective circuits. The same language with the same signification is in ch. 358, sec. 1, Laws of 1862. [Taylor's statutes, p. 318, sec. 137.] It is also provided here that a Court Commissioner may exercise within *his* county, the powers of a Circuit Judge at Chambers, &c.

It must be conceded that the order of Hunter, as Court Commissioner of Milwaukee County was void. It was not seriously urged otherwise.

The court below held that the jurisdiction of the court in the foreclosure action could not be inquired into collaterally. P. 19, fol. 46.

Such is not the law. Thompson against Whitman, 18 Wallace 457; Galpin vs. Page, ib. 350; Knowles vs. Logansburg Gaslight Co., Hill vs. Mendenhall, Gray vs. Larrymore, 2 Abb. U. S. R. 542, (10 California Cir.) The authorities in the state courts to the same

point, are so numerous that citation is needless. To cite a few: Hoffman vs. Hoffman, 46 N. Y. 33; Rape vs. Eaton, 9 Wis. 342; Falkner vs. Guild, 10 do. 573; Pollard vs. Wegner, 13 do. 572; Eli vs. Tallman, 14 do. 32; Flodland vs. Delaplaine, 19 do. 461.

When the record shows one mode of service, no other can be presumed,—cases above cited. In Wisconsin the statute requires that the judgment roll show jurisdiction of the defendant. R. S. Ch. 132, Sec. 35. The court therefore erred in not excluding the judgment roll in the foreclosure action. P. 19, fol. 46.

Error II.

The finding of fact was special, and does not support the judgments act of congress, March, 1865, *entitled*, "an act relating to criminal trials, and for other purposes."

The finding of fact is very meagre, (p. 28, fol. 70.) It is that there was an arrangement to which the mortgagors were parties, to get rid of the mortgage to the railroad company, by not paying taxes on the land; and that the parties who claim under the tax deed, had reason to believe that this was so.

To these facts the court annexes the following legal conclusions:

1st. That the title to the land is in the plaintiff.

2d. That the tax deed is invalid. (See tax deed page 20.)

3d. That the tax deed was not a good defense under the statute of limitations, because under the circumstances of the possession, it would be inequitable to allow that defense.

4th. That the plaintiff is entitled to recover.

Not one of the above legal propositions is a legitimate inference from the finding of fact. Title to the land certainly is not.

That the tax deed was invalid is not.

That a purchase at a tax sale of lands would be void where the purchaser knew that the person taxed intended some benefit by not paying his taxes, is not law. The sale is open to all.

The mortgagee may pay the taxes, bid in the land, and procure a tax title if he chooses. 31 N. Y. 411. It is not the case where one helps another to defraud, it not being found that the owner of the tax title holds it for the benefit of the mortgagors, or that the purchaser at the tax sale bought it for their benefit. It does not come within that class of cases where one sells property to enable another to do an unlawful act. Kriess vs. Seligmann, 8 Barbours 439.

Getting rid of the payment of a mortgage, in some cases, may be right, and every one of the mortgages given to the mortgagees in this case, was a swindle, as all acquainted with the history of Wisconsin know.

The third finding of law is not related to the finding of fact. The statute referred to is found in T. S. p. 441, sec. 173.

Equity does not prevent the statute. Fraud may, but no fraud is found.

The fourth legal conclusion is not related to the finding.

Matt H. Carpenter
Of Counsel

Supreme Court of the United States.

No. 323.

JOHN MUELLER AND JOHN ZIMMER,

Plaintiffs in Error,

vs.

LOUIS EHLERS.

In Error to the Circuit Court of the United States for the Eastern District of Wisconsin.

BRIEF AND POINTS OF DEFENDANT IN ERROR.

F. W. COTZHAUSEN,

of Counsel for L. Ehlers

Supreme Court of the United States.

No. 323.

JOHN MUELLER AND JOHN ZIMMER,
Plaintiffs in Error,

vs.

LOUIS EHLERS.

In Error to the Circuit Court of the United States for the Eastern District of Wisconsin.

BRIEF AND POINTS OF DEFENDANT IN ERROR.

[References are to marginal page.]

STATEMENT OF CASE.

The defendant in error brought this suit to recover the W. ½ of N. E. ¼ of Sec. 33, Town 12, N. of Range 21 E. in the County of Ozaukee, State of Wisconsin, claiming title under a sheriff's deed on foreclosure of mortgage.

The value of the premises exceeds $3000.

The plaintiffs in error admit being in possession, asserting title in themselves, derived by land contract from Geo. W. Foster and lease from Geo. A. Rowe. John Zimmer is but a sub-tenant of part of the premises under John Mueller.

A jury was waived and the trial had before the Court.

Finding and judgment in favor of the defendant in error, who wasthe plaintiff in the Court below.

The Record discloses the following facts: Orin and Austin Case, who were tenants in common of the lands in controversy, executed in October, 1856, together with their wives, a first mortgage to the Milwaukee & Superior Railroad Co. for $1,500 and interest, payable July 1, 1866, by the terms of which mortgage, among other things, the mortgagors for themselves, their heirs, executors, administrators and assigns, expressly covenanted to pay all taxes and assessments upon the premises, and every part thereof, at the time when the same should become due from year to year. This mortgage, with the note and bond accompanying the same, subsequently for value received came to the possession of one Henry Kirchhoff, who in 1869 brought a suit for the foreclosure of the same, as hereinafter more particularly set forth. No part of the principal or interest was ever paid.

About the year 1858, the Mortgagors, in disregard of their obligations, express as well as implied, conceived the idea of getting rid of the railroad Mortgage, by not paying the taxes(page 70). They allowed the lands to be sold in October, 1859, for the sum of $9.94 to one W. W. Tredway. From this sale the mortgagors did not redeem, though they had a right to do so within three years thereafter. A tax-deed was issued December 18th, 1862, to one Benjamin A. Jenkins, who then pretended to own the certificate of tax-sale.

In 1864, Benjamin A. Jenkins by his attorney E. S. Turner, commenced a suit against Austin Case, who was then in possession of the lands in controversy, apparently for the purpose of foreclosing

this tax-deed. Austin Case appeared by Geo. W. Foster, his attorney; put in a demurrer, which in January, 1865, was argued by counsel and overruled by the Court. Leave was granted to answer, but no further proceedings in said suit were ever had thereafter (page 70);—it still remains open and undisposed of on the records of the Court.

It also appears that some months prior to the argument of this demurrer, towit: on the 12th day of September 1864, a quit-claim deed was executed by Jenkins of this very same tax-title interest to Geo. W. Foster, who was then acting as attorney for Case in the suit above referred to. This quit-claim deed was however carefully concealed from the eyes of the public and the Court, and not recorded till April, 1869. The original seems to be missing.

The evidence further shows that about a month prior to the tax sale, towit: in September, 1859, another and subsequent mortgage was executed to one Joseph Mann, who is said to have assigned the same to Eugene S. Turner, the aforesaid attorney of B. A. Jenkins.

The deed from Jenkins to Foster, upon its face purports to be executed in consideration of $35.00, but Foster swears that he paid in the neighborhood of $550.00, having purchased at the same time from E. S. Turner the second mortgage on the lands executed in September 1859, to one Jos. Mann as aforesaid, and some judgments and other claims then outstanding against Case (page 57). The Court-records however, show that *after* this pretended purchase of the second mortgage by Foster, to-wit: in March, 1865, E. S. Turner in his own name commenced a suit for the foreclosure of this same mortgage against Austin Case et al. Orin Case being then dead, his wife and children were made parties to the action. The Milwaukee and Superior Railroad Co. also figures on the Record as a party defendant, but no service upon the same appears to have been had. In this suit the Case family again

appeared by Geo. Foster as their attorney; a regular decree of foreclosure was entered; a sale of the premises was had; Geo. W. Foster, the defendants' attorney again became the purchaser; he bid in the property in his name, but paid nothing aside from the costs of sale page 65).

In November 1866, the sale was reported and confirmed by the Court.

During all this time the premises remained in the possession of Austin Case and the widow and children of Orin Case; they were the apparent owners; the lands were assessed to them; there was no apparent change of possession until the year 1869, shortly before the suit for the foreclosure of the first mortgage was commenced (page 47).

But Foster claims that in 1864 or 1865, immediately after the purchase of the tax interest, Austin Case attorned to him, and remained in possession of the lands till December 1865 under a parol lease; that on January 1st 1866 he gave to Mary L. Case, wife of Austin Case, a lease for three years of the east 40 acres (rent $1.00 per year and taxes); that on December 1st 1866 he conveyed the west 40 acres to Mrs. Case by deed, who again on May 16th, 1869, sold them to Geo. A. Rowe, Foster's brother-in-law. On October 1st, 1869, Austin Case and family left for parts unknown. When Kirchhoff commenced his foreclosure suit in December, 1869, they could not be found.

The Court found as a matter of fact that the above transactions evidenced a fraudulent arrangement, to which themortgagors were parties, by which it was sought to avoid payment ot the railroad mortgage, and that the parties asserting title and claiming under the tax deed, had reason to believe this was so. (Page 70.)

On December 18th, 1869, Henry Kirchhoff filed a bill in the Circuit Court of Ozaukee County for the foreclosure of his mortgage. The mortgagors and their personal representatives were made parties to

the suit, although the equity of redemption on foreclosure of second mortgage had passed to Geo. W. Foster, and the record title then was in him and Rowe. The precise relation between the parties, who of record appeared to have become interested in said lands, not being known, all of them were joined as defendants, the bill alleging their interest or lien, if any, to have accrued subsequent to the lien of the railroad mortgage, andto be subject thereto. (Page 27.)

The summons was returned, duly served by the sheriff on E. S. Turner and Joseph Mann. The defendants Geo. W. Foster, Geo. A. Rowe and John Mueller in due time appeared by attorney, and answered. Service by publication was had upon the Case family. All defendants made default except Foster, Rowe and Mueller, who answered, setting up the tax deed of December 18th, 1862, as a paramount title. This issue not being a proper one to try in the foreclosure suit, it was stipulated to litigate the same in other manner and proceedings, to be separately instituted (page 40.)

Judgment was thereupon entered by which, among other things, it was adjudged (page 43) "that the defendants and all persons claiming under them, or any or either of them, after the filing of such notice of the pendency of this action, be forever barred and foreclosed of all right, title, interest and equity of redemption in the said mortgaged premises so sold, or any part thereof, *excepting however*, the asserted title or interest, if any such there be, of Geo. W. Foster, George A. Rowe and John Mueller, in and to the mortgaged premises, under and by virtue of the tax deed, said to have been issued on or about the 18th of December, 1862, by the clerk of the board of supervisors of Ozaukee County to one Benjamin A. Jenkins, the grantor of said defendants as above referred to, and in the answer of said defendants particularly set forth."

By virtue of this judgment the premises were sold and bid in by the defendant in error. The sale was duly confirmed and a deed issued to the purchaser under date of September 30th 1870.

On ground of this title Ejectment was brought, resulting in a judgment for the defendant in error.

I

Before noticing the several errors assigned by the plaintiffs in error, we beg to submit the question:

> Is the paper signed and filed October 27th, 1873, (By mistake "1872" instead of "1873" appears in printed case.) purporting to be a bill of exceptions, properly before the Court?
>
> We think it a nullity, and ought not to be considered here.

When a case is tried in October, 1872, decided April 28th, 1873 (page 10), judgment thereupon entered July 15th, 1873, and this judgment by writ of error removed to Supreme Court, one would suppose that the rights of the parties to such litigation, as appearing from the record, could not be disturbed by the filing of a special finding and of what purports to be a bill of exceptions, *six months* after the trial,— the time not having been extended by consent or express order of the Court.

If the general finding filed April 28th, 1873 (page 10), is not sufficient, and if without a bill of exceptions the rulings of the Court in the progress of the trial cannot be reviewed, no one is to blame but the plaintiffs in error themselves.

The law and practice under the Act of March 3rd, 1865, is too well settled to admit at present of either doubt or discussion. When the plaintiffs in error waived a jury trial, it was their duty *at the same term* to see to a proper settlement of exceptions (if any), and to a special finding, if deemed necessary or desirable by them.

> A bill of exceptions must be reduced to form and *signed during the term*, at which the case was tried.
>
> It would be a fatal error if it were to appear otherwise.
>
> Walton vs. United States, 9 Wheaton, 657.

The law requires a bill of exceptions to be tendered at the trial. If it be drawn up afterwards, it should be done immediately and *during the term*.

Ex parte Bradstreat 4 Peters 102.

A case ought not to be made up for purposes of a review here, after it has passed from the control of the Court below.

Flanders vs. Tweed, 9 Wall. 425.

Kearney vs. Case, 12 Wall. 275.

In the suit at bar the bill of exceptions was not *prepared*, *signed* or *filed* until after the commencement of the October term of this Court.

The act of June 1, 1872, does not change the law and practice on this subject. It is held to apply only *where there is no special congressional legislation* regulating the practice. But even under the state law the bill of exceptions would be too late;—the statutes of Wisconsin allowing only sixty days after notice of judgment within which to prepare and serve the same. No pretence is made that the state practice was resorted, or intended to be resorted to.

If we be correct in our views as above expressed, no exception presents itself for review here.

II

The first exception we find at page 46.

The plaintiffs in error objected to the introduction of the record and judgment roll in Kirchhoff vs. Dency Case, et al. The objection was promptly overruled.

The nature or ground thereof not being disclosed and the objection going to the whole record, we need not use argument to uphold the ruling of the Court below.

The defendants in error then moved to exclude the record and judgment roll as incompetent evidence, having first proven under

objection that Edward M. Hunter, who signed the order for publication of the summons (page 32), was not a commissioner of the county of Ozaukee, where the suit was then pending, but a commissioner of Milwaukee County.

The motion was overruled because the Court was of opinion that the plaintiffs in error could not attack the decree of the Circuit Court of Ozaukee County in this collateral action.

This view of the Court evidently was correct.

The proceedings were strictly *in rem*. The action was brought in the Circuit Court of the County of Ozaukee, where the mortgaged premises are situated, as required by Section 1 Chapter 124, Revised Statutes of 1858 of Wisconsin. It is a court of general jurisdiction. Every presumption is in favor of jurisdiction. Jurisdiction is to be presumed, whether there are recitals in the record to show it or not.

The order of publication, the order of reference, the final decree each and every proceeding in the suit, appear upon their face to be in strict conformity to law, vesting in the Court complete jurisdiction of both person and subject matter.

When entering a default, the Court held the order of publication to be *duly* made (page 36), and in its final decree recites that service of process was had upon all the defendants to the suit (page 39).

Nothing appears anywhere upon the face of the record or judgment roll to contradict or question the truth of these recitals.

As to the effect of such a judgment the Supreme Court of Wisconsin in Falkner vs. Guild 10 Wis. 572, says:

> "The proceedings were in a court of general jurisdiction; and the general rule in respect to such courts is, at all events where jurisdiction appears, that though the record does not show everything necessary to regularity, it is to be presumed unless the contrary expressly appears. And even if irregularity or gross error do appear, the *judgment cannot be questioned collaterally.*"

Now, no one pretends that the Court had not jurisdiction of the subject matter, or that Geo. W. Foster, Geo. A. Rowe and John Mueller, who appeared and answered, were not properly before the Court. The only question that was, and possibly could be raised, is whether the Case family were legally summoned.

The fact that a summons was published as to them, is not denied;–evidence of such service in due and proper form appears to have been before the Court.

The objection to the record is merely based upon the supposed want of authority of E. M. Hunter to make the order for publication.

We say "*supposed*" want of authority, as under the statutes any commissioner is authorized to sign such an order (infra).

But supposing counsel for the plaintiffs in error to be correct in his construction as to the power of court commissioners, still it would not affect the jurisdiction of the Circuit Court. The defect, if any, would be a mere irregularity or error, such as frequently occurs in the course of judicial proceedings. The court commissioner, while in general authorized to make orders of publication, *erred* in granting it in this particular case, and the Circuit Court in holding the order to be duly made, *erred* again. If defective in this particular, ample provisions exist to correct these judicial mistakes by direct proceeding in the suit, but it would be novel indeed now to reverse or annul in this collateral proceeding the rulings and judgments of the Circuit Court of Ozaukee County on an abstract question of law, because this Honorable Court might differ from the Commissioner and State Court on the construction of a local statute and the powers of judicial officers under the same.

> No precedent to sustain such an assumption will be found. The case of Thompson vs. Whitman, of late so much cited, turns upon entirely different facts and principles.

This question however, though fairly presented upon the bill of exceptions, is not at all decisive of our case and of comparatively little bearing upon the same.

There are a number of other grounds upon which the ruling of the Circuit Court as to the competency of this record as evidence may be sustained.

a. It lies not in the mouth of these plaintiffs in error to interpose an objection on the ground of supposed defects, which in no way or manner affect them. If the Case family were not properly before the Court, and the decree as to them were not binding or in law not existing at all, still it is good as to Foster, Rowe and Mueller, who appeared, answered and defended. The record to say the least, was competent evidence and admissible as to the latter and parties claiming under them. They are bound by the decree, all their rights were cut off, excepting such as were especially reserved by the decree; as *to them this record and judgment roll is conclusive.*

b. It must also be borne in mind that the Case family were not at all *necessary* parties to the foreclosure. Whatever right or equity of redemption after execution of the railroad mortgage they had left, it had passed as early as 1866 on foreclosure of second mortgage to Geo. W. Foster; the title was in him and his assigns;— not even a possessory interest after October, 1869, was by them retained. Conceding then for purposes of this argument, that the Court never obtained jurisdiction over the person of the mortgagors, still it had complete jurisdiction of the subject matter and of all parties who asserted any interest whatsoever to the lands in controversy, and on foreclosure and sale a complete title passed to the purchaser.

> According to the weight of modern authorities, the rule is settled that a mortgagor, who has absolutely parted with the equity of redemption is *not a necessary,* though he is a very proper party defendant in an action to foreclose the mortgage.
>
> Delaplaine vs. Lewis, 19 Wis. 476.

c. The assertion of counsel that under our laws a commissioner has no power to make an order in a case not within his circuit, is unfounded, unsustained by authority and in direct conflict with a long and well established practice.

The general duties and powers of commissioners are prescribed by chapter 358 General Laws of Wisconsin, 1862. This chapter embraces a number of subjects particularly specified, and then confers general authority upon commissioners to exercise within their counties the powers of a circuit judge at chambers.

Orders out of court without notice may however be made by any judge of the court, *in any part of the state.*

In addition to the authority conferred by the above law, we find numerous other earlier and later statutes, p. e. commissioners may entertain jurisdiction in proceedings supple mentary to execution—may solemnize marriages, etc.

By sec. 10 chapter 124 Revised Statutes of Wisconsin of 1858, it is provided that

> "When the person on whom the service is to be made cannot after due diligence be found within the state and that fact shall appear by affidavit to the satisfaction of a court, or a judge thereof, or a county judge or court commissioner, etc".—

Under this special statute it seems to be left at the pleasure of the plaintiff to apply for such an order anywhere within the state, to *any* court, judge or commissioner. And that such is the correct construction and practice, becomes still more evident on examination of the New York law on the same subject (sec. 135 New York Code).

When our legislature in 1856 copied the law of New York, we find it adopting the whole section in *haec verba*, subject only to this qualification:

Wherever the word *"the"* occurs, our legislature substituted the

indefinite article "*a*"; a change indeed, the intention of which cannot possibly be ignored!

III

The exceptions at page 71 we deem not necessary to discuss at any length.

As a matter of fact the tax deed was found to be a fraud, procured by collusion and acquired for the *benefit* of the mortgagors, and held by their attorney on *secret trust* forthem. It became merged in the original title.

It is also void *upon its face.*—it appearing therefrom, that the County Treasurer, who made the sale, became himself the purchaser.—

> Such private speculation on behalf of officers entrusted with important functions (selling to themselves) the law will not tolerate.
>
> Blackwell on Tax titles, chap. 24 page 474.
>
> Expressly forbidden by sections 9, 10, 11, and 12 chap. 22 Laws of Wisconsin, 1859.

Again the tax deed is void, because it does not truly recite the name of the purchaser at the tax sale.

> Krueger vs. Knab, 22 Wis. 429.
>
> Vorth vs. Wendell, 22 Wis. 431.

The Statute of Limitations on this tax deed, is no bar to our suit.

> Whatever rights a party on ground of a tax–title and adverse possession under it, may ordinarily have and assert, the statute of limitations is not applicable, when (as here) by professions of submission to the title of his adversary, the tax title claimant induced him to delay the prosecution of a suit, or if by fraud or stratagem he should lull him into inactivity or throw him off his guard.

By such or similar conduct a tax-title owner may forfeit the privileges extended by the statute of limitations.

Knox vs. Cleveland, 13 Wis. 252.
Miller vs. Keene, 5 Watts 348.
Comegys vs. Carley, 3 Watts 280.
McMahon vs. McGraw, 26 Wis. 614.

A number of other propositions on the facts and the law, were argued in the Court below, but they are not presented by this writ of error.

Respectfully,

F. W. COTZHAUSEN,
of Counsel for L. Ehlers.